



8011-01
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85957; File No. SR-NASDAQ-2019-040)

May 29, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Complementary Services Offered by the Exchange Under Rule IM-5900-7

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 16, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the treatment of direct listings including Level 2 American Depositary Receipts (ADRs) under IM-5900-7, specify that an Eligible New Listing includes Level 3 ADRs, update the values of certain services, modify the market advisory tools provided under IM-5900-7 to certain new listings, and make certain other clarifying changes.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq offers complimentary services under IM-5900-7 to companies listing on the Nasdaq Global and Global Select Markets in connection with an initial public offering (other than a company listed under IM-5101-2), upon emerging from bankruptcy, in connection with a spin-off or carve-out from another company, or in conjunction with a business combination that satisfies the conditions in Nasdaq IM-5101-2(b) ("Eligible New Listings") and to companies (other than a company listed under IM-5101-2) switching their listing from the New York Stock Exchange ("NYSE") to the Global or Global Select Markets ("Eligible Switches").³ Nasdaq believes that the complimentary service program offers valuable services to newly listing companies, designed to help ease the transition of becoming a public company or switching

³ See Exchange Act Release No. 65963 (December 15, 2011), 76 FR 79262 (December 21, 2011) (SR-NASDAQ-2011-122) (adopting IM-5900-7); Exchange Act Release No. 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (SR-NASDAQ-2014-058) (adopting changes to IM-5900-7); Exchange Act Release No. 78806 (September 9, 2016), 81 FR 63523 (September 15, 2016) (SR-NASDAQ-2016-098); Exchange Act Release No. 79366 (November 21, 2016), 81 FR 85663 (November 28, 2016) (SR-NASDAQ-2016-106); Exchange Act Release No. 82791 (February 28, 2018), 83 FR 9354 (March 5, 2018) (SR-NASDAQ-2018-15); Exchange Act Release No. 82976 (March 30, 2018), 83 FR 14683 (April 5, 2018) (SR-NASDAQ-2018-23).

markets, and makes listing on Nasdaq more attractive to these companies. The services offered include a whistleblower hotline, investor relations website, disclosure services for earnings or other press releases, webcasting, market analytic tools, and may include market advisory tools such as stock surveillance (collectively the “Service Package”).⁴

Direct Listing

Nasdaq recognizes that some companies that have sold common equity securities in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing, may wish to list those securities to allow existing shareholders to sell their shares. Nasdaq previously adopted requirements under IM-5315-1 applicable to such companies listing on the Nasdaq Global Select Market⁵ and now proposes to include in the definition of an “Eligible New Listing” that receives complimentary services under IM-5900-7 a company listing in connection with a direct listing. This change is consistent with the approach approved by the Commission in the rules of NYSE, which provides similar services to direct listings.⁶

⁴ In addition, all companies listed on Nasdaq receive other standard services from Nasdaq, including Nasdaq Online and the Market Intelligence Desk.

⁵ Exchange Act Release No. 85156 (February 15, 2019), 84 FR 5787 (February 22, 2019).

⁶ Section 907.00 of the NYSE Listed Company Manual provides that for the purposes of this Section 907.00, the term “Eligible New Listing” means “any U.S. company that lists common stock on the Exchange for the first time and any non-U.S. company that lists an equity security on the Exchange under Section 102.01 or 103.00 of the Manual for the first time, regardless of whether such U.S. or non-U.S. company conducts an offering...” See Exchange Act Release No. 68143 (November 2, 2012), 77 FR 67053 (November 8, 2012) (SR-NYSE-2012-44); As subsequently amended Section 907.00 of the NYSE Listed Company Manual now provides that “the term “Eligible New Listing” means (i) any U.S. company that lists common stock on the Exchange for the first time and any non-U.S. company that lists an equity security on the Exchange under Section 102.01 or 103.00 of the Manual for the first time, regardless of whether such U.S. or non-U.S. company conducts an offering and (ii) any U.S. or non-U.S. company emerging from a bankruptcy, spinoff (where a company lists new shares in the absence of a public

American Depositary Receipts

U.S. investors often hold equity securities of foreign issuers in the form of ADRs. An ADR is a security that represents an ownership interest in a specified number of foreign securities that have been placed with a depositary financial institution by the issuer or holders of such securities. An ADR is in essence a substitute trading mechanism for foreign securities allowing the issuer or holder to transfer title to the underlying foreign securities by delivery of the ADR. The depositary is typically a U.S. bank or trust company, and it usually appoints a custodian to hold the deposited securities in the home market of the foreign issuer.⁷ The custodian is often a bank, and may be a subsidiary or branch of the depositary or a third-party institution with which the depositary has a contractual custodian relationship.

In order to list ADRs, Nasdaq requires that such ADRs be sponsored. A sponsored ADR facility is typically established jointly by an issuer and a depositary. The foreign issuer of the deposited securities typically enters into a deposit agreement with the depositary. For a sponsored ADR, both the depositary and the foreign company sign the F-6 registration statement under the Securities Act of 1933. The deposit agreement sets out the rights and responsibilities of the issuer and the depositary, and the ADR holders as third party beneficiaries. Each ADR holder becomes a party to such agreement through its holding of the ADR.

offering), and carve-out (where a company carves out a business line or division, which then conducts a separate initial public offering).”

⁷ ADRs have many characteristics of a domestic equity security but also provide U.S. investors with several attributes that are absent in direct ownership of foreign securities. The depositary (or the custodian) monitors the declaration of dividends, collects them and converts them to U.S. dollars for distribution. In addition, the clearance and settlement process for ADRs generally is the same as for other domestic securities that are traded in the U.S. markets. Thus, investors can own an interest in securities of foreign issuers while holding securities that trade, clear and settle within automated U.S. systems and within U.S. timeframes.

Market participants describe sponsored facilities in terms of three categories, based on the extent to which the issuer of the deposited securities has accessed the U.S. securities market. A “Level 1 facility” is an ADR facility the ADRs of which trade in the U.S. over-the-counter market and the foreign issuer is not required to register with or report to the Commission under Section 12 or 15 of the Exchange Act. “Level 2” refers to ADRs that are listed on a U.S. stock exchange by a foreign issuer that becomes subject to certain SEC reporting requirements,⁸ but the foreign issuer has not sold ADRs in the United States in order to raise capital or effect an acquisition. “Level 3” denotes ADRs that are listed on a U.S. stock exchange where the foreign issuer has sold ADRs in the United States in a registered public offering. A foreign issuer can apply to list Level 2 or Level 3 ADRs on any of Nasdaq’s market tiers.

Nasdaq proposes to include Level 2 ADRs in the definition of an “Eligible New Listing” that receives complimentary services under IM-5900-7 when the ADRs are listed in connection with a direct listing under IM-5315-1(c). Nasdaq also proposes to specify that an Eligible New Listing includes Level 3 ADRs by stating that the rule reference in IM-5900-7 to listing “in connection with [the company’s] initial public offering” means the initial public offering in the United States, including ADRs, rather than the initial public offering of the underlying foreign securities in the company’s home market. Such companies would receive the same services under IM-5900-7, with the same value, as any other Eligible New Listing. This change is consistent with the approach approved by the Commission in the rules of NYSE, which provides

⁸ Following their listing on Nasdaq, such companies will also be required to register and file annual reports under the Exchange Act with the Commission.

similar services to companies listing ADRs in connection with initial public offering or through a direct listing.⁹

Other Changes

As part of the Service Package, Eligible New Listings and Eligible Switches with a market capitalization of \$750 million or more currently receive a choice of market advisory tools, including a monthly ownership analytics and event driven targeting tool, as described in IM-5900-7(a)(iii). Nasdaq has determined to discontinue providing this tool because over time Nasdaq observed that it receives minimal interest from Nasdaq customers, in particular because there is considerable overlap in services with the stock surveillance tool.¹⁰ Accordingly, Nasdaq proposes to remove the monthly ownership analytics and event driven targeting tool from the list of available market advisory tools under IM-5900-7(a) and to renumber the remaining market advisory tools accordingly.¹¹

Nasdaq also proposes to update the values of the services contained in IM-5900-7 to their current values. Depending on a company's market capitalization and whether it is an Eligible New Listing or an Eligible Switch, the total revised value of the services provided

⁹ See footnote 6 above. Section 907.00 of the NYSE Listed Company Manual provides that "an "equity security" means common stock or common share equivalents such as ordinary shares, New York shares, global shares, American Depository Receipts, or Global Depository Receipts." See Exchange Act Release No. 68143 (November 2, 2012), 77 FR 67053 (November 8, 2012) (SR-NYSE-2012-44).

¹⁰ Currently no company receives the monthly ownership analytics and event driven targeting service from Nasdaq.

¹¹ The revised package of services will maintain the same approximate retail value as the one currently provided because Nasdaq presumed that a company would use stock surveillance, which has an approximate retail value of \$56,500 as revised (\$56,000 previously), and global targeting, which has an approximate retail value of \$44,000 rather than the monthly ownership analytics and event driven targeting, which has an approximate retail value of \$48,000, because there is considerable overlap between the latter and the stock surveillance service.

ranges from \$151,000 to \$828,000, and one-time development fees of approximately \$5,000 are waived.¹²

The proposed rule change will be operative for new listings on or after the effectiveness of this rule filing. Companies that list before that date will continue to receive services as described in the current rule.

Finally, Nasdaq also proposes to make non-substantive changes to update the introductory note in IM-5900-7 and to include the specific operative date of the proposed rule change to ease understanding of the rule.

Nasdaq represents, and this proposed rule change will help ensure, that individual listed companies, including ADRs and direct listings, are not given specially negotiated packages of products or services to list, or remain listed, which the Commission has previously stated would raise unfair discrimination issues under the Exchange Act.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Exchange Act,¹³ in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,¹⁴ in particular, in that it is designed to promote just and equitable principles of trade, to remove

¹² The exact values are set forth in proposed IM-5900-7. Under the current rule the stated value of the services provided ranges from \$150,000 to \$824,000, and one-time development fees of approximately \$5,000 are waived. In describing the total value of the services for companies that can select more than one market advisory tool, Nasdaq presumes that a company would use stock surveillance, which has an approximate retail value of \$56,500 as revised (\$56,000 previously), and global targeting, which has an approximate retail value of \$44,000. Companies could, of course, select different combinations of the three services offered, but these other combinations would have lower total approximate retail values. See Exchange Act Release No. 78392 (July 22, 2016), 81 FR 49705, 49706 n.10 (July 28, 2016) (Notice of Filing for SR-NASDAQ-2016-098).

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Nasdaq also believes that the proposed rule change is consistent with the provisions Sections 6(b)(4),¹⁵ 6(b)(5),¹⁶ and 6(b)(8),¹⁷ in that the proposal is designed, among other things, to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities and to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between issuers, and that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Nasdaq faces competition in the market for listing services,¹⁸ and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to offer complimentary services to attract and retain listings as part of this competition. All similarly situated companies are eligible for the same package of services. Nasdaq previously created different tiers of services based on a market capitalization. As noted in the Service Package filings, Nasdaq believes that it is appropriate to offer different services based on a company's market capitalization given that larger companies generally will need more and different governance, communication and intelligence services.¹⁹

¹⁵ 15 U.S.C. 78f(4).

¹⁶ 15 U.S.C. 78f(5).

¹⁷ 15 U.S.C. 78f(8).

¹⁸ The Justice Department has noted the intense competitive environment for exchange listings. See "NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit" (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

¹⁹ Exchange Act Release No. 65963, 76 FR at 79265.

Nasdaq also believes it is reasonable, and not unfairly discriminatory, to offer complimentary services to a foreign company listing Level 2 ADRs or a domestic company listing in connection with a direct listing under IM-5315-1. Such companies are similar to other Eligible New Listings, such as initial public offerings of domestic companies, and will have increased need to focus on identifying and communicating with its shareholders because they are listing on a national securities exchange in the U.S. for the first time. Like the other Eligible New Listings that receive complimentary services under the existing rule, these companies are transitioning to the traditional U.S. public company model and the complimentary services provided will help ease that transition.²⁰ In addition, these companies will be purchasing many of these services for the first time, and offering complimentary services will provide Nasdaq Corporate Solutions and third-party service providers the opportunity to demonstrate the value of its services and forge a relationship with the company at a time when it is choosing its service providers. For these reasons, Nasdaq believes it is not an inequitable allocation of fees nor unfairly discriminatory to offer the services to a foreign company listing Level 2 ADRs or a domestic company listing in connection with a direct listing under IM-5315-1. To the contrary, this proposed change will eliminate a distinction between companies listing common stock or ADRs through a direct listing and companies listing through an IPO.

Nasdaq believes that the proposed change to specify that the rule reference in IM-5900-7 to listing “in connection with [the company’s] initial public offering” means the initial public offering in the United States, including ADRs, rather than the initial public offering of the

²⁰ Although companies listing Level 2 ADRs may have prior experience being a public company in their home country, they, nonetheless, will be transitioning to the traditional public company model in the United States. Following their listing on Nasdaq, such companies will also be required to register and file annual reports under the Exchange Act with the Commission.

underlying foreign securities in the company's home market is consistent with Section 6(b)(5) of the Exchange Act because it will provide transparency in the rules and address an ambiguity by specifying that listing of Level 3 ADRs on Nasdaq is considered an initial public offering notwithstanding that the issuer of ADRs may already be a public company in their home country.

As described above, Nasdaq faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. As part of the Service Package, Eligible New Listings and Eligible Switches with a market capitalization of \$750 million or more currently receive a choice of market advisory tools, including a monthly ownership analytics and event driven targeting tool, as described in IM-5900-7(a)(iii). Based on Nasdaq's experience with offering this service, Nasdaq has determined to discontinue providing this tool because over time Nasdaq observed that this tool receives minimal interest from Nasdaq customers, in particular because the stock surveillance tool and the monthly ownership analytics and event driven targeting tool have considerable overlap between these services. Nasdaq believes that the removal of the monthly ownership analytics and event driven targeting tool is not unfairly discriminatory because all similarly situated companies are eligible for the same package of services. Moreover, no company currently uses this service.

The Commission has previously indicated pursuant to Section 19(b) of the Exchange Act²¹ that updating the values of the services within the rule is necessary,²² and Nasdaq does not believe this update has an effect on the allocation of fees nor does it permit unfair discrimination,

²¹ 15 U.S.C. 78s(b).

²² See Exchange Act Release No. 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (SR-NASDAQ-2014-058) (footnote 39 and accompanying text: "We would expect Nasdaq, consistent with Section 19(b) of the Exchange Act, to periodically update the retail values of services offered should they change. This will help to provide transparency to listed companies on the value of the free services they receive and the actual costs associated with listing on Nasdaq.")

as issuers will continue to receive the same services, except for the monthly ownership analytics and event driven targeting tool, which will be removed as described above. Further, this update will enhance the transparency of Nasdaq's rules and the value of the services it offers companies, thus promoting just and equitable principles of trade. As such, the proposed rule change is consistent with the requirements of Section 6(b)(4) and (5) of the Exchange Act.

Finally, Nasdaq notes that the proposed change to update the introductory note in IM-5900-7 and to include the specific operative date of the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act because it will clarify the rule without making any substantive change.

Nasdaq represents, and this proposed rule change will help ensure, that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, which the Commission has previously stated would raise unfair discrimination issues under the Exchange Act.²³

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As noted above, Nasdaq faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. The proposed rule changes reflect that competition, but do not impose any burden on the competition with other exchanges. Rather, Nasdaq believes the proposed changes will result in more potential listings being eligible to receive the package and therefore will enhance competition for new listings of ADRs and companies listing in

²³ See Exchange Act Release No. 79366, 81 FR 85663 at 85665 (citing Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449, 51452 (August 18, 2011) (approving NYSE-2011-20)).

connection with a direct listing under IM-5315-1. Finally, the clarification that listing of Level 3 ADRs on Nasdaq is considered an initial public offering in the United States will not impose any burden on competition because it will provide transparency in the rules and eliminate an ambiguity. This change is consistent with the approach approved by the Commission in the rules of NYSE, which provides similar services to companies listing ADRs in connection with initial public offering.²⁴

Other exchanges can also offer similar services to companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act²⁵ and Rule 19b-4(f)(6) thereunder.²⁶ Because the proposed rule change does not:

(i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.²⁷

²⁴ See footnote 9 above.

²⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁶ 17 CFR 240.19b-4(f)(6).

²⁷ In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five

A proposed rule change filed under Rule 19b-4(f)(6)²⁸ normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. In its filing with the Commission, Nasdaq has asked the Commission to waive the 30-day operative delay to allow Nasdaq to offer the Service Package to any companies listing ADRs or common stock through a direct listing during such 30-day period. In addition, Nasdaq has asked the Commission to waive the 30-day operative delay in order to immediately (i) reflect the accurate values of the complimentary services in Nasdaq's rules, (ii) specify that companies listing Level 3 ADRs on Nasdaq are considered to be listing in connection with an initial public offering in the United States, and (iii) remove the monthly ownership analytics and event driven targeting tool from the list of available market advisory tools under IM-5900-7(a).

The Commission notes that Nasdaq's proposal to offer the Service Package to any companies listing ADRs or common stock through a direct listing is substantially similar to the rules of another exchange that were approved previously by the Commission as consistent with the Act after being published in the Federal Register for notice and comment.³⁰ In addition, the Commission notes that the other proposed amendments to Nasdaq's rules would enhance the transparency of IM-5900-7 and eliminate a service that is not used by any listed company. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent

business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁸ 17 CFR 240.19b-4(f)(6).

²⁹ 17 CFR 240.19b-4(f)(6)(iii).

³⁰ See Securities Exchange Act Release No. 68143, note 6 supra.

with the protection of investors and the public interest and hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.³¹

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2019-040 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2019-040. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies

³¹ For purposes only of waiving the operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-040, and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Eduardo A. Aleman
Deputy Secretary

³² 17 CFR 200.30-3(a)(12).

